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No. 85-1050

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

JACK F. TRAHAN,
Appellant,

v.

EMMA J. TRAHAN,
Appellee.

On Appeal From The Court Of Appeals Of Texas For The Third Supreme Judicial District

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED BY APPELLANT

1. Is the application of Texas community property and partition laws to a 1963 divorce, thereby dividing military retirement benefits previously vested solely in Appellant by federal law and final judgment applying such federal law, repugnant to the Constitution and laws of the United States?

2. Did the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Section 1408, annul the decision of this Court in *McCarty v. McCarty*, 453 U.S. 210 (1981) in its entirety and retroactively permit establishment of state community property concepts in place of the pre-emptive federal statutory plan described in *McCarty* so as to permit partition of retirement benefits arising from a marriage that ended in divorce in 1963?

3. Is the award of a money judgment against Appellant under the facts of this case a taking without compensation or a denial of federal due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

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MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16.1, Subsections (b) and (c), moves the Court to dismiss the appeal on the ground that it does not present a substantial federal question; and to affirm the judgment on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

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OPINION BELOW

The Opinion of the Court of Appeals for the Third Supreme Judicial District of Texas is reported at 682 SW2d 332. The denial of review by the Texas Supreme Court and the refusal of rehearing by the Texas Supreme Court were without opinion.

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STATEMENT OF THE CASE

Appellant served in the United States Army during his marriage to Appellee, and he thereby became entitled to military retirement benefits. Appellant and Appellee were divorced on January 22, 1963. The judgment of divorce made no mention of Appellant's military retirement benefits.

On February 14, 1977, Appellee filed suit to partition the military retirement benefits. Judgment was rendered in favor of Appellee and affirmed by the Texas Court of Appeals in *Trahan v. Trahan,* 609 SW2d 820 (Tex. Civ. App.—1980, error granted).

While the case was pending on Application for Writ of Error in the Texas Supreme Court, this Court decided *McCarty v. McCarty,* 453 U.S. 210 (1981). Based upon the decision in *McCarty,* the Texas Supreme Court reversed Appellee's judgment. *Trahan v. Trahan,* 626 SW2d 485 (Tex. 1981).

On September 8, 1982, Congress passed the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Section 1408 (hereinafter referred to as "USFSPA"). On February 10, 1983, Appellee filed the instant suit for partition. Judgment was rendered in favor of Appellee, and affirmed in the opinion below, *Trahan v. Trahan,* 682 SW2d 332 (Tex.Ct.App.—1984). The Texas Supreme Court refused Appellant's Application for Writ of Error without opinion on June 12, 1985.

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ARGUMENT

I. This Court Lacks Jurisdiction Under 28 U.S.C. Section 1257 (2).

II. The Questions Presented Are Insubstantial And Were Correctly Decided Below.

1. The application of Texas community property laws is not repugnant to federal retirement laws as modified by the USFSPA.

2. USFSPA nullifies the effect of the *McCarty* decision and permits state courts to deal with military retirement benefits in accordance with local law.

3. The award of military retirement benefits to appellee does not violate any Fifth or Fourteenth Amendment rights of appellant.

BRIEF OF ARGUMENT

I. This Court Lacks Jurisdiction Under 28 U.S.C. Section 1257(2).

Appellant asserts jurisdiction under 28 U.S.C. Section 1257 (2), claiming that the Texas community property statutes have been applied in a way repugnant to the laws of the United States. He relies upon *McCarty v. McCarty*, 453 U.S. 210 (1981).

The basis of appellate jurisdiction in *McCarty* was the same as the basis of the holding. This Court concluded that the federal statute on military retirement benefits then in existence pre-empted state community property laws with respect thereto, and that state divorce courts were accordingly precluded by the Supremacy Clause from dividing such benefits. 453 U.S. at 219 n. 12.

In reaching this conclusion, the Court concluded that there was a conflict betweeen the terms of the federal retirement statutes as they then existed, and the state community property rights; and that the state community property rights, as applied, injured the objectives of the federal retirement program as it then existed. Ibid at 232.

Since the decision in *McCarty,* however, Congress has enacted the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Section 1408. The USFSPA gives specific rights to former spouses, such as Appellee herein, in the military retirement benefits of servicemen. The principal entitlement of former spouses is set forth in Section 1408(c)(1):

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

By this legislation, Congress has specifically granted to state divorce courts that authority which *McCarty* preempted them from exercising. There is thus no longer a conflict between state and Federal laws. The jurisdictional basis asserted by Appellant, namely, that the community property laws are repugnant to the Federal retirement laws, no longer exists.[1]

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1. This Court denied a Petition for Certiorari in a case involving similar questions to the instant case. *Jett v. Jett,* 449 So.2d 557 (La.Ct.App. 1984), writ den. 458 So.2d 473 (La. 1984), cert. den. 105 U.S. 2215 (No. 84-1375, April 22, 1985).

Indeed, this Court forecast in *McCarty* that, "Congress may well decide . . . that more protection should be afforded the former spouse of a retired servicemember. This decision, however, is for Congress alone". 453 U.S. 235.

II. The Questions Presented Are Insubstantial And Were Correctly Decided Below.

1. The application of Texas community property laws is not repugnant to federal retirement laws as modified by the USFSPA.

[See brief or argument under I., above.]

2. USFSPA nullifies the effect of the McCarty decision and permits state courts to deal with military retirement benefits in accordance with local law.

The Court below correctly held that the purpose of the USFSPA is to reverse the effect of the *McCarty* decision. *Trahan v. Trahan,* 682 SW2d 332, 334 (Tex. Ct. App.—Austin, 1984, writ ref'd n.r.e.), citing *Cameron v. Cameron,* 641 SW2d 210, 212 (Tex. 1982).

The holding is amply supported by the legislative history. The opinion below quotes extensively from the Senate Report No. 502, *Trahan v. Trahan,* supra, p.335, which includes the following observation:

> The provisions of S. 1814 reversing the effect of the *McCarty* decision are retroactive to June 26, 1981, the date on which the U.S. Supreme Court issued that decision. That is, the committee intends the legislation to restore the law to what it was when the courts were permitted to apply state divorce laws to military retired pay.

Most of the state courts which have construed the USFSPA have reached the same conclusion. See, for ex-

ample, *In re Marriage of Hopkins,* 191 Cal.Rptr. 70 (Cal Ct. App. 1983); *Smith v. Smith,* 458 A2d 711 (Del. Fam. Ct. 1983); *Walentowski v. Walentowski,* 672 P2d 657 (NM 1983); *De Gryse v. De Gryse,* 661 P2d 185 (Ariz. 1983); *In re Smith,* 669 P2d 448 (Wash. 1983); *Castiglioni v. Castiglioni,* 471 A2d 809 (N.J. Super. 1984); *Jett v. Jett,* 449 So.2d 557 (La.Ct.App. 1984), writ den. 458 So.2d 473 (La. 1984), cert. den. 105 S.Ct. 2115 (No. 84-1375, April 22, 1985).

Indeed, even the two cases cited in Appellant's Jurisdictional Statement, *Moller v. Moller,* 356 NW2d 909 (S.D. 1984) and *Bishir and Britt v. Bishir,* 84-SC-809-DG, slip opinion October 31, 1985, 12 FLR 1035 (Ky. 11-19-85), do not take a contrary view. Both of these cases involved a request to reopen divorce judgments final before the *McCarty* decision. The Courts declined to do so, but solely on the basis of local law, not on the basis of any construction of the USFSPA or *McCarty.*

Appellant makes various complaints about the way in which the Texas court applied its community property law. In so doing, Appellant misses a fundamental thrust of the USFSPA, which is that a state "court may treat disposable retired or retainer pay . . . in *accordance with the law of the jurisdiction of such court.*" 10 U.S.C. Section 1408(c) [italics added]. The legislative history makes clear that "The provision is intended to remove the federal pre-emption found to exist by United States Supreme Court and permits State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable." Senate Report No. 502, quoted in the opinion below, 682 SW2d at page 335.

This also disposes of Appellant's complaint that the decisions of some states are in conflict. The USFSPA permits diverse treatment "in accordance with local law". Section 1408(c)(1). This Court has repeatedly recognized that "the whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594 (1890), quoted in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), and in *McCarty*, 453 U.S. 210, 212.

Appellant also argues that, even if *McCarty* is no longer effective today, it still has retroactive effect prior to 1981. To the contrary, Congress obviously intended that the USFSPA should nullify *McCarty* altogether.[2] This is apparent from the basic entitlement section, Section 1408(c)(1), quoted above. The Section selects as the beginning date June 25, 1981 which was the day prior to the date on which the decision in *McCarty* was handed down.

Indeed it seems that virtually every court which has addressed the issue of whether *McCarty* was intended to be retroactive, has held that it is not retroactive, many cases so holding even before the USFSPA had passed. *Segrest v. Segrest*, 649 SW2d 610 (Tex. 1983); *McGinn v.*

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2. Indeed, if the Texas Court of Appeals made any error at all, it was in refusing Appellee's cross-point of error. Appellee complained that the trial court should have granted her judgment for her share of the military retirement benefits back to 1965, when Appellant began receiving them; instead of granting her judgment only back to June 25, 1981, the date prior to the *McCarty* decision. Appellee argued that since the USFSPA nullified *McCarty*, prevailing Texas law entitled her to recover her share from the date when Appellant began receiving the benefits. *Cearley v. Cearley*, 544 SW2d 661 (Tex. 1976); *Taggart v. Taggart*, 552 SW2d 422 (Tex. 1977).

McGinn, 337 NW2d 632 (Mich. Ct. App. 1983); *Erspan v. Badgett,* 659 F2d 26 (5th Cir. 1981); *Rodriquez v. Rodriquez,* 133 Ariz. 88, 649 P2d 291 (Ariz. Ct.App. 1982); *In re Marriage of Fellers,* 125 Cal.App.3d 254, 178 Cal.Rptr. 35 (Cal. Ct.App 1981); *In re Marriage of Allcock,* 107 Ill.App.3d 150, 62 Ill. Dec. 865, 437 NE2d 392 (Ill. Ct.App. 1982); *Whenry v. Whenry,* 652 P2d 1188 (N.M. 1982); *In re Marriage of Vinson,* 644 P2d 635 (Ore Ct. App. 1982).

Appellant also argues that the USFSPA is not intended to permit a "reopening" of court orders decided before the *McCarty* decision, and he cites a fragment of the House Conference Report. Appellant's Jurisdictional Statement pp. 16-18. This fragment of the House Conference Report is inconsistent with the majority of the legislative history, and does not seem to express the true intent of Congress. The overriding intent of the USFSPA is to nullify all effects of the *McCarty* decision, and to let each state court deal with military retirement benefits in accordance with the law of the local jurisdiction.

But even assuming arguendo, that Congress did not intend to permit the "reopening" of court orders decided prior to *McCarty,* the present action is not a suit "to reopen" in the usual sense of that word. This is a *partition* action, which, in its very essence, does not seek to "reopen" a prior order or case. The theory of a partition action in the context of divorce is that former spouses become tenants-in-common as to any assets not divided in their divorce decree. As tenants-in-common, they are entitled to seek a subsequent partition of their co-tenant estate. A partition action has always been regarded under Texas law as something quite distinct from a bill of review

or other action seeking to reopen or modify a prior judgment. *Yeo v. Yeo,* 581 SW2d 734, 736 (Tex.Ct.App. 1979, writ ref'd n.r.e.).

The Court below correctly decided the res judicata issue in holding that, "'The judgment in [the prior] case was res adjudicata only of the issue then presented of the facts as they then appeared *and of the legislation then existing.' State v. Powell,* 134 SW2d 746, 748 (Tex. Civ. App. 1910, writ ref'd), quoting *Utter v. Franklin,* 172 U.S. 416 (1899) (emphasis added). See also *United States v. Sioux Nation of Indians,* 448 U.S. 371 (1980)."

Appellant argues that the "legislative nullification" exception to the res judicata doctrine applies only in cases where "public rights" are involved. Assuming *arguendo* that this is correct, it has long been held by both Federal and Texas courts that a government pension is a "public right", and that a public employee has no vested rights in the statutory pension. *Dodge v. Board of Education,* 302 U.S. 74, 82 L.Ed. 57, 58 S.Ct. 98 (1937); *Stouper v. Jones,* 284 F2d 240 (D.C. Ct. App. 1960); *Dallas v. Trammell,* 129 Tex. 150, 101 SW2d 1009 (Tex. 1937).

3. The award of military retirement benefits to Appellee does not violate any Fifth or Fourteenth Amendment rights of Appellant.

Appellant had no exclusive property right in his military retirement benefits at the time of his divorce in 1963. Under Texas law, military retirement benefits were community property at that time. *Kirkham v. Kirkham,* 335 SW2d 393 (Tex.Ct.App.—San Antonio, no writ).

The only case cited by Appellant is *U.S. v. Larionoff,* 431 U.S. 864 (1977). In *Larionoff,* this Court held that

naval personnel were entitled to re-enlistment bonuses based upon regulations in effect at the time they signed a re-enlistment agreement with the Navy, despite the fact that the Navy subsequently changed the terms of the bonus by regulation. It is important to note that the decision in *Larionoff* (a narrow 5-4 vote), turned on the fact that the benefit involved, a reenlistment bonus, was based upon a specific re-enlistment agreement between the government and the particular servicemen involved, which created contractual rights. In addition, this Court expressly declined to base its holding on any constitutional grounds, but rather based the decision on a construction of congressional intent.

To the undersigned counsel's knowledge, the United States Supreme Court has never held that Congress cannot alter the terms of governmental pensions by subsequent legislation. To the contrary, the Federal Courts of Appeals have upheld the action of Congress in altering government pension rights on several occasions. *Stouper v. Jones,* 284 F2d 240 (D.C. Ct.App. 1960); *Costello v. United States,* 587 F2d 424, 426 (Ct.App.—9th Cir., 1978), cert. den., 442 U.S. 929, 99 S.Ct. 2858, 61 L.Ed.2d 296 (1979).

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CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the court below affirmed.

Respectfully submitted,

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